



U.S. Merit Systems Protection Board

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**Congressional  
Budget  
Justification  
FY 2022**

Submitted to the  
Committee on Appropriations

May 2021

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**The U.S. Merit Systems Protection Board**  
**Congressional Budget Justification**  
**Fiscal Year 2022**

**Introduction**

The U.S. Merit Systems Protection Board's (MSPB) fiscal year (FY) 2022 budget request is \$48,371,700, including \$2,345,000 to be transferred from the Civil Service Retirement and Disability Fund. This request is submitted in accordance with guidance provided by the Office of Management and Budget (OMB) and reflects a \$1,536,700 increase from the enacted FY 2021 level of \$46,835,000. The 3% increase supports 235 full-time equivalents (FTEs) and the goals outlined in the Strategic Plan and Annual Performance Plan for FY 2022.

MSPB faces its most dire crisis since it was established by the Civil Service Reform Act of 1978. Lacking a quorum of Board members for over four years, MSPB has a backlog of 3,241 petitions for review (PFR) as of April 30, 2021, and continues to receive a steady stream of new PFRs. Even at current funding and staffing levels, adjudicating this backlog will be an immense undertaking. Upon confirmation of three new Board members, the hiring of support staff may be required for each Board member; altogether, these FTEs will play a key role in addressing the backlog at MSPB.

The COVID-19 pandemic also has had an effect on MSPB's operations. Although we encouraged parties to use MSPB's e-Appeal Online electronic filing system, the pandemic has affected MSPB's processing times. To mitigate this, the agency has established new processing procedures and began conducting hearings from home. Additionally, the unprecedented volume of telework has strained MSPB's information technology (IT) services and affected the progress of the agency's IT modernization.

Given these factors, reducing MSPB's funding level would have an adverse effect on the agency's ability to protect the Federal merit systems, ensure due process, promote the merit system principles (MSPs), and prevent prohibited personnel practices (PPPs). MSPB is thankful for the appropriations it has received and looks forward to the arrival of new Board members to restore the agency's ability to fully pursue its mission.

**Internal Challenges Affecting MSPB Operations**

*Lack of Board Quorum*

On January 8, 2017, the Board lost its quorum of members. Although agencies and appellants can file petitions for review of administrative judges' (AJ) decisions with the Board, the Board cannot issue decisions on PFRs and other cases at headquarters (HQ) unless it has a quorum. Since the loss of quorum, the number of pending PFRs has grown into a significant backlog. There are now over 3,000 PFRs pending at MSPB headquarters.

Once a quorum is restored, and the Board can issue decisions again, history suggests there will be significant additional workload for MSPB. In a typical year, approximately 11% of the Board's PFR decisions are remanded back to the AJs for further adjudication. With the arrival of new Board

members, whose priorities may differ from those of the previous Board, an above-average percentage of cases may be remanded to the AJs in the regional and field offices. Moreover, additional remands may result as the new Board issues regulations and precedent concerning several new statutes that have been enacted during the period MSPB has lacked a quorum. Similarly, an above-average percentage of recommended PFR decisions drafted by career staff may also require additional revision before issuance by the new Board. It is essential to keep MSPB fully staffed to address this significant additional workload.

In addition to not issuing Board decisions without a quorum, MSPB has not been able to release study reports to the President and Congress. MSPB conducts objective, independent research supporting strong merit systems that protect the public's interest in a high-quality, diverse professional workforce managed under the MSPs and free from PPPs. MSPB's research, which is summarized in formal reports to the President and Congress, addresses topics such as hiring practices and authorities, sexual harassment in the Federal workplace, whistleblower protections, managing employee conduct and performance problems, and the effectiveness of the human resources (HR) workforce. In addition, a new MSPB research agenda, which was last published in 2015, is ready for approval and issuance by the new Board. MSPB's Office of Policy and Evaluation (OPE) has prepared an updated research agenda after soliciting ideas from stakeholders (including Federal employees and supervisors, unions and other employee groups, agency chief human capital officers, and the public) and evaluating those ideas against criteria such as importance, timeliness, and practicality. That research agenda is ready for incoming Board members to consider when they arrive.

The updated research agenda will determine MSPB's studies workload for the next few years, including FY 2022. MSPB's studies program needs to remain fully staffed to carry out that research agenda. Surveys are essential to many of the proposed studies, including those related to the incidence of PPPs and adherence to MSPs. MSPB procured its own survey platform to avoid relying on a new contract for each survey, which should shorten the timeline for MSPB survey activity and make each survey more cost-effective. The research function, in conjunction with MSPB's adjudication of individual appeals and authority to review Office of Personnel Management (OPM) regulations and significant actions, ensures that the Board both oversees Federal merit systems at the systemic level and remedies PPPs on an individual level.

Finally, the absence of a quorum has impacted MSPB's ability to promulgate regulations to reflect congressionally mandated changes in the agency's jurisdiction and procedures. The last substantial update to MSPB's regulations was in 2015. Since then, several changes to MSPB's regulations have become necessary to ensure the regulations comply with newly enacted statutes and to reflect improvements in MSPB's procedures. Once a quorum is restored, significant resources will need to be devoted to the process of updating MSPB's regulations.

On April 28, 2021, President Biden announced his intent to nominate Cathy Harris as Chair of MSPB. We hope this is an initial indication that a new Board will be quickly nominated and confirmed in 2021.

### *Retirement Eligibility and Human Capital Planning*

MSPB received enacted budgets for FYs 2014-2021 that allowed the agency to build and sustain a sufficient workforce to perform its statutory functions effectively and efficiently. However, nearly 27% of MSPB employees, including approximately 39% of AJs and adjudication managers involved with processing initial appeals, are eligible to retire by the end of FY 2022. In FY 2023, roughly 30% of all MSPB employees will be eligible to retire. Budget reductions would result in an inability to backfill these and other critical vacancies, which would slow case processing times—including processing times mandated by statute and regulation. Such a reduction in MSPB's workforce would also limit the capacity for outreach and education services, which play a key role in ensuring agencies understand the Board's role and processes and interact in a timely and responsive way with MSPB. This in turn improves efficiency and effectiveness throughout the Federal Government by helping agencies understand and act in accordance with MSPs, avoid PPPs, and promote the overall efficiency of the civil service.

### *MSPB's Information Technology Modernization*

In FY 2019, MSPB began modernizing its core business applications, starting with developing a new case management workflow system to process and track each initial appeal and PFR filed with the agency. This updated functionality will replace MSPB's e-Appeal Online system and modernizes the agency's document management and document assembly capabilities. The new system will replace several legacy systems, which are at or nearing end-of-life and prevent MSPB from achieving 100% electronic adjudication of appeals. The implementation of the new applications is scheduled to continue into FY 2022 as MSPB retires those legacy systems, enhances cybersecurity, and modernizes telecommunication services under the General Services Administration's (GSA) Enterprise Infrastructure Solutions contract. Moreover, MSPB will begin decommissioning the data center at MSPB HQ since the modernized applications will be hosted in the cloud. Additionally, the agency plans to increase internet capacity to support cloud adoption.

### **External Events Affecting MSPB Operations**

There are several external factors that have affected MSPB's operations and will continue to, resulting in the need for additional resources.

#### *Enactment of New Statutes by Congress*

##### *Whistleblower Protection Laws*

From the time the Civil Service Reform Act of 1978 established the original eleven PPPs, Congress added only one additional PPP in the ensuing 20 years. In the past seven years, Congress has added two additional PPPs, both of which were prompted by concerns about whistleblower protection. Since the enactment of the Whistleblower Protection Enhancement Act of 2012 (WPEA), appeals filed in the regions and PFRs to the Board involving reprisal for whistleblowing or other activity protected by the WPEA have increased significantly. Twenty-five percent of all PFRs filed in FY 2020 involved such claims.

Because of statutory amendments in the past ten years, even in the absence of an otherwise appealable action, the MSPB may now have jurisdiction over claims of retaliation based on the exercise of a right related to prior whistleblowing activity, assisting another individual in the exercise of any appeal, complaint, or grievance, cooperating with or disclosing information to an agency's IG or OSC, or for refusing to obey an order that would require the individual to violate a law, rule, or regulation. Most recently, the National Defense Authorization Act (NDAA) for FY 2020, enacted December 20, 2019, explicitly protected whistleblower disclosures to Congress, including some classified disclosures. This will likely result in more appeals to MSPB, and confusion over how to properly disclose classified information to Congress could also lead to increased disciplinary actions regarding improper disclosure, resulting in new appeals.

The WPEA also increased the complexity of adjudicating whistleblower cases. Prior to the WPEA, for example, many whistleblower claims failed under then-current case law because the disclosure at issue was made to the wrongdoer or was made in the appellant's normal course of duties. Such findings were made at the first step of a three-step analysis, and thus remaining issues were never adjudicated. Pursuant to the WPEA, such disclosures may now be found to be protected, and the legal analysis proceeds to the second and frequently third steps. Accordingly, a hearing is required in a greater number of cases, and the legal analysis required for whistleblower cases under the WPEA is more complex, time-consuming, and resource intensive.

As part of the WPEA, on a pilot basis, Congress permitted employees with cases involving reprisal for whistleblowing or other activities protected by the WPEA to appeal MSPB's decisions to any Federal circuit court of appeals of competent jurisdiction, rather than only to the U.S. Court of Appeals for the Federal Circuit (Federal Circuit), as previously had been the case. Congress made the pilot program permanent effective November 26, 2017. Before the pandemic this had increased travel by MSPB attorneys to various venues across the country, and it will likely continue to require additional travel after the pandemic is over.

In addition to resulting in more MSPB cases, some of the statutory changes in recent years will also significantly impact Federal agencies. For example, both the Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017 and the Office of Special Counsel (OSC) Reauthorization Act contained provisions mandating proposed discipline for any supervisor found by the head of an agency, OSC, MSPB, an administrative law judge (ALJ), a Federal judge, or an Inspector General (IG) to have committed whistleblower retaliation. For a first offense the agency must propose a suspension of at least three days, and for a second offense an agency must propose removal. While suspensions of 14 days and under are not otherwise appealable to MSPB, removals are appealable. This provision represents a significant transformation in how agencies are required to respond to retaliators. Effective November 16, 2020, OPM issued implementing regulations that likely will have the effect of significantly increasing awareness of and compliance with these provisions throughout Government and increase appeals to MSPB.

Overall, it is probable that both the number and complexity of WPEA-related appeals and PFRs will continue to grow in the coming years, requiring additional resources to adjudicate them.

*National Defense Authorization Act for FY 2017 (P.L. 114-328)*

The NDAA for FY 2017 contained three provisions that have significantly affected MSPB by increasing appeals to the agency.

Section 512 provides limited appeals rights to dual status military technicians serving in the National Guard. This is a significant change in the law with respect to such employees, who previously had no such rights.

Section 1138 enacted the Administrative Leave Act of 2016 (codified as 5 U.S.C. § 6329b), which expands MSPB's jurisdiction by adding to the possible grounds on which an employee might file an appeal. It makes placement on investigative leave for "not less than 70 workdays" a personnel action under the subsection 8 and 9 whistleblower protections of 5 U.S.C. § 2302(b).

Section 1140 expanded MSPB's jurisdiction in cases of voluntary separation during a personnel investigation. Under 5 U.S.C. § 3322, an employee who voluntarily resigns while under investigation is entitled to file an appeal with MSPB of the notation of an adverse finding resulting from the investigation in his or her personnel file.

#### *Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017*

The Department of Veterans Affairs (VA) Accountability and Whistleblower Protection Act of 2017 essentially replaced the Veterans Access, Choice, and Accountability Act of 2014 for purposes of VA Senior Executive Service appeals. It also changed the requirements for appeals of adverse actions taken against VA employees under this law, including how MSPB processes those appeals. Among the Act's other significant changes, it lowers the standard of proof for VA adverse actions taken under 38 U.S.C. § 714 from preponderant to substantial evidence and requires an MSPB AJ to issue a decision on an appeal of such actions within 180 days.

38 U.S.C. § 714 eliminated MSPB's authority to mitigate penalties; however, subsequent decisions of the Federal Circuit have found that MSPB must review the legality of any agency penalty. The Federal Circuit recently ruled that MSPB cannot mitigate penalties under section 714 but must consider the reasonableness of the penalty under a substantial evidence standard. If MSPB finds the penalty is not supported by substantial evidence, it must remand the case to the VA for further proceedings. See *Brenner v. Department of Veterans Affairs*, 990 F.3d 1313 (Fed. Cir. 2021); *Sayers v. Department of Veterans Affairs*, 954 F.3d 1370 (Fed. Cir. 2020). The Act also contains a provision that is similar to the Government-wide requirement that discipline be proposed for supervisors found to have committed whistleblower retaliation. In addition, it expands the definition of what MSPB has previously viewed as a covered personnel action from those listed in 5 U.S.C. § 2302 to include matters such as conducting a negative peer review, opening a retaliatory investigation, or taking a personnel action against an employee relating to participating in an audit or investigation by the Comptroller General. Although not all VA cases are brought under this law, the MSPB has seen an overall increase in the number of VA cases filed since the law took effect.

#### *Other External Factors*

##### *Executive Order 13839, "Promoting Accountability and Streamlining Removal Procedures Consistent with Merit System Principles"*

On May 25, 2018, President Trump issued Executive Order (EO) 13839, which stated in pertinent part:

Agencies shall not agree to erase, remove, alter, or withhold from another agency any information about a civilian employee's performance or conduct in that employee's official personnel records, including an employee's Official Personnel Folder and Employee Performance File, as part of, or as a condition to, resolving a formal or informal complaint by the employee or settling an administrative challenge to an adverse personnel action.

On October 16, 2020, OPM issued a final rule implementing this provision which was effective on November 16, 2020. The regulation disallows not only "clean record" settlements (i.e., settlements in which the appellant resigns in return for the agency removing from the appellant's record documentation of the adverse personnel action), but also any settlement agreement in which an action is mitigated, changed to a no-fault reason, or in any way changed or corrected without admission of error by the agency. The provision limits the potential for reaching an agreement and settling cases on terms both parties might otherwise find appropriate. The provision decreases the number of settlements in MSPB appeals, resulting in an increase in hearings and related case processing AJs must conduct in cases that otherwise might have settled absent the provision.

On January 22, 2021, President Biden revoked Executive Order 13839 via Executive Order 14003, Section 3(c). However, OPM's regulation is still in effect. Until OPM revokes its regulation, MSPB remains constrained in its ability to accept "clean record" settlements and settlements that mitigate, change, or correct an adverse action without admission of error by the agency.

#### *Workload Resulting from Reorganizations*

Some Federal agencies, such as the U.S. Postal Service, have announced or put into effect reorganization plans. Such changes will potentially cause furloughs, early retirement incentives (Voluntary Early Retirement Authority and Voluntary Separation Incentive Payments), and the increased use of reductions in force (RIFs) by agencies, all of which could lead to an increase in initial appeals and PFRs to MSPB.

#### *Supreme Court Decision and Executive Actions Related to LGBTQ Employment Rights*

In *Bostock v. Clayton County, GA*, 140 S. Ct. 1731 (2020), the Supreme Court held that taking action against employees because of their sexual identity or transgender status constitutes sex discrimination. While discrimination based on either sexual orientation or transgender status had not universally been seen as a violation of Title VII, the holding in *Bostock* opens the door for the filing and adjudication of more appeals raising sex discrimination on those bases as affirmative defenses, thus expanding the range of issues MSPB will review in such appeals. While other Supreme Court decisions on topics such as age discrimination (*Babb v. Wilkie* 140 S. Ct. 1168 (2000)) and deference to agency regulations (*Kisor v. Wilkie* 139 S. Ct. 2400 (2019)) will guide and inform MSPB adjudications, the agency does not anticipate an increase in the number of appeals filed as a result of their issuance.

Separately, on January 25, 2021, President Biden issued EO 13988, which requires that agencies promulgate agency actions (orders, regulations, policies, etc.) that prohibit discrimination on the basis of "gender identity or sexual orientation."



### *Federal Circuit Decisions Related to Whistleblowing and Performance-based Actions*

In *Hessami v. MPSB*, 979 F.3d 1362 (Fed. Cir. 2020), the Federal Circuit made several rulings which increase the likelihood that whistleblowing appeals will proceed to a hearing on the merits of a claim. The court held that in determining whether an appellant made a nonfrivolous jurisdictional allegation under the WPEA, the Board may not consider evidence introduced by the agency. Instead, it is limited to “evaluating whether the appellant has alleged sufficient factual matter, accepted as true, to state a claim that is plausible on its face.” The court in *Hessami* also held that whether an appellant’s whistleblowing disclosure concerned disputable policy matters does not preclude it from being protected because the WPEA is clear that “policy decisions and disclosable misconduct are not mutually exclusive.”

In *Santos v. NASA*, 990 F.3d 1355 (Fed. Cir. 2021), a case that is not yet final and thus subject to potential rehearing, the Federal Circuit significantly expanded the potential scope of admissible evidence and discovery in performance-based actions taken under 5 U.S.C. § 4302, holding that when an agency predicates removal on an employee’s failure to satisfy obligations imposed by a performance improvement period (PIP), the agency must further demonstrate that the employee’s performance justified imposition of a PIP in the first instance. If the current decision stands, it will complicate adjudication of performance-based actions before MSPB.

Both of these decisions—by increasing the number and complexity of hearings that are conducted in cases involving claims of whistleblowing, and those based on performance under 5 U.S.C. § 4302—will potentially call for additional adjudication resources, including court reporter costs.

### *Potential Workload Resulting from the COVID-19 Pandemic*

As a result of COVID-19 pandemic, telework was mandated for many Federal agency employees. Now, that vaccines have become widely available, Federal agencies are grappling with return-to-office policies. OPM and other agencies are working on issuing Government-wide guidance about returning the workforce to agency offices, and the future of telework and other remote work flexibilities. Perceived inequalities in the execution of these guidelines could generate an uptick in appeals.

## **FY 2022 Budget Request**

### **Appropriation Language**

For necessary expenses to carry out functions of the U.S. Merit Systems Protection Board pursuant to Reorganization Plan Number 2 of 1978, the Civil Service Reform Act of 1978, and the Whistleblower Protection Act of 1989 (5 U.S.C. § 5509 note), as amended, including services as authorized by 5 U.S.C. § 3109, rental of conference rooms in the District of Columbia and elsewhere, hire of passenger motor vehicles, direct procurement of survey printing, and not to exceed \$2,000 for official reception and representation expenses, \$46,026,700, to remain available until September 30, 2023, and in addition \$2,345,000, to remain available until September 30, 2023, for administrative expenses to adjudicate retirement appeals to be transferred from the Civil Service Retirement and Disability Fund in amounts to be determined by the U.S. Merit Systems Protection Board.

The Board has authority to adjudicate appeals from a final administrative action or order affecting the rights or interests of an individual under 5 U.S.C. § 8347(d) (the Civil Service Retirement System) and 5 U.S.C. § 8461(e) (the Federal Employees' Retirement System). Pursuant to 5 U.S.C. § 8348(a)(3), the Fund is made available, subject to such annual limitation as Congress may prescribe, for any expenses incurred by the Board in the administration of such appeals.

## **Strategic Goals and Objectives**

MSPB's FY 2022 Congressional Budget Justification is structured based on the Board's Strategic Plan. The agency's performance goals cover the critical components of two strategic goals, and the performance measures support the Board's ability to manage and report performance over time.

The strategic goals and objectives are:

**Strategic Goal 1: Serve the public interest by *protecting* MSPs and *safeguarding* the civil service from PPPs.**

### **Strategic Objectives:**

1A: Provide understandable, high-quality resolution of appeals supported by fair and efficient adjudication and alternative dispute resolution (ADR) processes.

1B: Enforce timely compliance with MSPB decisions.

1C: Conduct objective, timely studies of the Federal merit systems and human capital management issues.

1D: Review and act upon the rules, regulations, and significant actions of the OPM, as appropriate.

**Strategic Goal 2: Advance the public interest through *education* and *promotion* of stronger merit systems, *adherence* to MSPs and *prevention* of PPPs.**

### **Strategic Objectives:**

2A: MSPB's work is referenced by a variety of policy-related, educational, professional, or media sources.

2B: Support and improve the practice of merit, adherence to MSPs, and prevention of PPPs in the workplace through successful outreach.

2C: Advance the understanding of the concept of merit, the MSPs, and the PPPs by developing and sharing informational and educational materials and guidance.

## **FY 2022 Request by Object Class**

In accordance with OMB's guidance, MSPB's FY 2022 submission of \$48,371,700 includes the OPM transfer of \$2,345,000 from the Civil Service Retirement and Disability Fund. With this level

of funding, MSPB believes it can meet the goals and objectives of the strategic plan in an effective and efficient manner.

A discussion of changes from the level enacted in FY 2021 is outlined below:

***Personnel Compensation & Benefits – an increase of \$80,000***

<b>MOC</b>	<b>Description</b>	<b>FY 2021 Enacted (000)</b>	<b>FY 2022 Request (000)</b>	<b>Increase (decrease) over FY 2021 (000)</b>
11	<b>Personnel Compensation</b>	<b>\$28,320</b>	<b>\$28,375</b>	<b>\$55</b>
12	<b>Benefits</b>	<b>\$8,400</b>	<b>\$8,425</b>	<b>\$25</b>

Approximately 80% of MSPB’s funding is for personnel compensation and benefit expenses, which make up the largest amount of the budget request. The request above indicates a less than 1% increase in funding in the amount of \$80,000 for salaries and benefits. The current personnel compensation and benefits level could challenge MSPB’s ability to recruit and retain a highly qualified workforce, as current pay levels would remain static.

***Travel & Transportation of Persons – no change***

<b>MOC</b>	<b>Description</b>	<b>FY 2021 Enacted (000)</b>	<b>FY 2022 Request (000)</b>	<b>Increase (decrease) over FY 2021 (000)</b>
21	<b>Travel &amp; Transportation of Persons</b>	<b>\$200</b>	<b>\$200</b>	<b>\$0</b>

The pandemic increased the use of collaboration platforms, thereby reducing the demand for travel. However, there is still a need for travel in appropriate circumstances and where collaboration platforms are not available.

Historically, Board members make regional and field office visits, attend mission-related conferences, and request that regional directors periodically attend meetings at HQ. Additionally, due to the All Circuit Review Act, which extends jurisdiction over appeals with whistleblower issues to all U.S. circuit courts, MSPB’s attorneys have periodically been required to travel to various Federal courts of appeals to represent the agency—something rarely required before the enactment of the WPEA. MSPB cannot predict or control the number of court-ordered hearings or oral arguments that might require travel.

*Transportation of Things – no change*

<b>MOC</b>	<b>Description</b>	<b>FY 2021 Enacted (000)</b>	<b>FY 2022 Request (000)</b>	<b>Increase (decrease) over FY 2021 (000)</b>
22	Transportation of Things	\$45	\$45	\$0

This category covers freight-related costs and various courier services.

*Rent, Communications, & Utilities – an increase of \$1,685,000*

<b>MOC</b>	<b>Description</b>	<b>FY 2021 Enacted (000)</b>	<b>FY 2022 Request (000)</b>	<b>Increase (decrease) over FY 2021 (000)</b>
23	Rent, Communications & Utilities	\$3,125	\$4,810	\$1,685

Approximately 8% of MSPB’s funding is for leasing of office space. The agency makes rental payments to GSA for office space at MSPB’s Washington, D.C. HQ and for all regional and field offices. Lease agreements are a critical priority, and since there are no cost savings in FY 2022, an increase of \$1,400,000 is requested to fund the lease agreements currently in place with GSA. The remaining increase of \$285,000 would support ongoing IT modernization of telecommunication services needed to meet mission requirements.

*Printing – no change*

<b>MOC</b>	<b>Description</b>	<b>FY 2021 Enacted (000)</b>	<b>FY 2022 Request (000)</b>	<b>Increase (decrease) over FY 2021 (000)</b>
24	Printing	\$75	\$75	\$0

MSPB utilizes the Government Publishing Office printing program for copying case files. Once the new Board is in place, MSPB will resume issuing PFR decisions, and these funds will support the printing of case files, studies, and reports.

*Other Contractual Services – a decrease of \$228,000*

<b>MOC</b>	<b>Description</b>	<b>FY 2021 Enacted (000)</b>	<b>FY 2022 Request (000)</b>	<b>Increase (decrease) over FY 2021 (000)</b>
25	<b>Other Contractual Services</b>	\$3,498	\$3,270	(\$228)

To meet OMB’s target for MSPB, a decrease of \$228,000 in Other Contractual Services was imposed. This reduction in funding critically impacts IT requirements and slows MSPB’s ability to modernize IT infrastructure.

This object class includes MSPB’s Reimbursable Service Agreements (RSA) with the U.S. Treasury Department’s Bureau of Fiscal Service (BFS) for accounting, purchasing, and travel-related services; the U.S. Department of Agriculture’s (USDA) Animal and Plant Health Inspection Service (APHIS) for personnel services; and USDA’s National Finance Center (NFC) for payroll services. Other RSAs included in this object class fund are agreements with the U.S. Coast Guard and Federal Trade Commission for services of ALJs, as well as agreements with the National Archives and Records Administration for records storage.

Additionally, this category includes court reporting services, employee training, IT hardware and software maintenance renewals, software license renewals, operation and maintenance of non-IT equipment, and miscellaneous services that support agency strategic planning and performance evaluation.

*Supplies & Materials – no change*

<b>MOC</b>	<b>Description</b>	<b>FY 2021 Enacted (000)</b>	<b>FY 2022 Request (000)</b>	<b>Increase (decrease) over FY 2021 (000)</b>
26	<b>Supplies &amp; Materials</b>	\$509	\$509	\$0

This category funds electronic subscriptions (e.g., Westlaw and legal research materials), as well as IT cloud services (e.g., Microsoft Office 365, Azure, and Listserv subscriptions), which are critical to MSPB operations.

*Equipment – no change*

<b>MOC</b>	<b>Description</b>	<b>FY 2021 Enacted (000)</b>	<b>FY 2022 Request (000)</b>	<b>Increase (decrease) over FY 2021 (000)</b>
<b>31</b>	<b>Equipment</b>	<b>\$318</b>	<b>\$318</b>	<b>\$0</b>

MSPB replaces equipment such as servers, laptops, copiers, printers, scanners, and video teleconferencing equipment that breaks down, is damaged, or at end of life.

**Budget Schedule O – Object Classification (Thousands of Dollars)**

	<b>FY 2020 Actual</b>	<b>FY 2021 Enacted</b>	<b>FY 2022 Request</b>	<b>Change</b>
Direct Obligations:				
Personnel Compensation	\$26,917	\$28,320	\$28,375	\$55
Civilian Personnel Benefits	8,444	8,400	8,425	25
Travel of Persons	51	200	200	0
Transportation of Things	89	45	45	0
Rental payments to GSA	3,474	2,200	3,600	1,400
Rental Payments to Others	0	65	65	0
Communications, Utilities, and Miscellaneous Charges	308	860	1,145	285
Printing and Reproduction	35	75	75	0
Other Services	790	1,425	1,276	(149)
Other Purchases of Goods and Services from Government Accounts	2,134	1,650	1,650	0
Maintenance of Facilities	34	35	75	40
Maintenance of Equipment	346	388	269	(119)
Supplies & Materials	82	509	509	0
Equipment/Lease Improvement	1,536	318	318	0
<b>Direct Obligation. . .</b>	<b>\$44,240</b>	<b>\$44,490</b>	<b>\$46,027</b>	<b>\$1,537</b>
Reimbursable Obligations. . .	2,345	2,345	2,345	0
<b>Total New Obligations. . .</b>	<b>\$46,585</b>	<b>\$46,835</b>	<b>\$48,372</b>	<b>\$1,537</b>

## Budget Schedule Q - Employment Summary

	FY 2020 Enacted	FY 2021 Enacted	FY 2022 Request	Change
Direct:				
Civilian full-time equivalent employment	220	220	220	0
Reimbursable:				
Civilian full-time equivalent employment	<u>15</u>	<u>15</u>	<u>15</u>	<u>0</u>
<b>Total. . .</b>	<b>235</b>	<b>235</b>	<b>235</b>	<b>0</b>

### About MSPB

MSPB has its origin in the Pendleton Act of 1883, which established the Civil Service Commission (CSC) and a merit-based employment system for the Federal Government. The Pendleton Act was passed after the assassination of President Garfield by a disgruntled Federal job seeker and grew out of the 19<sup>th</sup> century reform movement to curtail the excesses of political patronage in Government and ensure a stable highly qualified workforce to serve the public. Over time, it became clear that the CSC could not properly, adequately, and simultaneously set managerial policy, protect the merit systems, and adjudicate appeals. Concern over the inherent conflict of interest in the CSC's role as both rule-maker and judge was a principal motivating factor behind the passage of the Civil Service Reform Act of 1978 (CSRA). The CSRA replaced the CSC with three new agencies: MSPB as the successor to the CSC in its quasi-judicial capacity; OPM to serve as the President's agent for Federal workforce management policy and procedure; and the Federal Labor Relations Authority to oversee Federal labor-management relations. The CSRA also codified for the first time the values of the merit systems as the MSPs and defined the PPPs.

### Board Organization

The Board members are the Chairman, Vice Chairman, and Board Member. Board Members are nominated by the President, confirmed by the Senate, and serve overlapping, non-renewable seven-year terms. No more than two of the three Board members can be from the same political party. The Board members adjudicate the cases brought before them. By statute, the Chairman is the chief executive and administrative officer of MSPB. The office directors report to the Chairman through the Executive Director. The agency has its HQ in Washington, D.C., with six regional and two field offices located throughout the United States in which AJs adjudicate cases at the initial appeal level, akin to a trial court.

For FY 2021, the agency was funded at 235 FTEs to conduct and support its statutory duties.

### Providing and Using Administrative Data for Statistical Purposes

MSPB does not have administrative datasets with the potential for statistical use as outlined in OMB Memorandum M-14-06, "Guidance for Providing and Using Administrative Data for Statistical Purposes." However, statistical data can be found in the Board's Annual Reports available at [www.mspb.gov](http://www.mspb.gov). The Annual Report contains summaries of significant opinions issued by MSPB's reviewing courts, case-processing data for initial appeals, and summaries of other merit systems



activity including articles posted on MSPB's website. It also contains a review of current OPM issues, and summaries of MSPB's congressional, international, and outreach activities, citations to MSPB work, internal management issues, and the external factors that affect the Board's work.

## **Adjudication**

The majority of cases brought to the Board are appeals of adverse actions—that is, removals, suspensions of more than 14 days, reductions in grade or pay, and furloughs of 30 days or less. The next largest number of cases involves appeals of OPM and some agency determinations in retirement matters. Congress has given the Board jurisdiction to hear cases and complaints filed under a variety of other laws, including the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. § 4301 *et seq.*; the Veterans Employment Opportunity Act, 5 U.S.C. § 3330a *et seq.*; the Whistleblower Protection Act (WPA), Pub. L. No. 101-12; the WPEA, Pub. L. No. 112-199; the VA Accountability and the Whistleblower Protection Enhancement Act, Pub. L. No. 115-41; the Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017, Pub. L. No. 115-73; and additional authorities listed in the regulation set out at 5 C.F.R. § 1201.3.

Other types of actions that may be appealed to the Board include: performance-based removals or reductions in grade; denials of within-grade salary increases; RIF actions; suitability determinations; OPM employment practices (the development and use of examinations, qualification standards, tests, and other measurement instruments); denials of restoration or reemployment rights; and certain terminations of probationary employees.

An appellant files an appeal with the appropriate MSPB regional or field office having geographical jurisdiction. An AJ in the office ensures that the parties receive the procedures called for in the law and MSPB's regulations and, after providing a full opportunity to develop the record on all relevant matters, issues an initial decision. Since March 2020, the regional and field offices have adjusted their processes and procedures to the virtual environment and have continued to adjudicate appeals without interruption. Unless a party files a PFR with the Board, the initial decision becomes final 35 days after issuance. Any party, OPM, or OSC may petition the full Board in Washington, D.C. to review the initial decision. When a PFR is filed, the Board's decision on the PFR constitutes the final administrative decision on the appeal.

The Board's final decision, whether it is an initial decision of an AJ that has become final or the Board's decision on a PFR, may be appealed to the Federal Circuit; or, in cases involving allegations of discrimination, to a U.S. district court or the Equal Employment Opportunity Commission (EEOC). In addition, certain cases involving allegations of reprisal for whistleblowing may be appealed to any of the U.S. circuit courts of appeals with competent jurisdiction.

If a party believes that the other party is not complying with an MSPB order or a settlement agreement entered into the record for MSPB enforcement, the party can file a petition for enforcement with the regional or field office that issued the initial decision. Once the AJ issues an initial decision, which may find compliance, non-compliance, or partial compliance, depending on the number of issues raised, either party may file a PFR with the full Board. Additionally, even if neither party files a PFR of an initial decision finding non-compliance, MSPB's regulations require that the case be referred to the full Board to ensure that the non-complying party has reached compliance.

In addition to adjudicating cases on the merits, MSPB also provides several ADR services to assist parties in resolving their cases. Use of these services is voluntary, provides the parties more control of the process, and can result in effective resolution of a case. In addition, resolving a case through ADR procedures can save time and reduce costs to the appellant, their agency, MSPB, and Government-wide as compared to the more formal regulations and procedures involved with adjudication on the merits.

### **Mediation Appeals Program**

The Mediation Appeals Program (MAP) offers the services of the agency's trained and certified mediators as an alternative to the formal appeal processes and procedures of MSPB's regulations. Mediators facilitate a discussion between the parties in a confidential setting to help them identify issues and barriers to an agreement that will aid in resolving their disputes and settling the appeal quickly, economically, and to the benefit of all concerned. Unlike traditional mediation, MAP charges no fees. Both parties must agree to its use before the appeal will be accepted for the MAP process, and both must agree on its resolution before any settlement is concluded. Unlike the traditional appeal process, the parties control the result of the case under the skilled guidance of the mediator, who plays no role in deciding the appeal, should they not reach an agreement. Importantly, because almost all mediations occur near the beginning of adjudication, MAP saves time and money for the Federal employees and agencies who resolve their cases through this process.

Because of these advantages, MAP has become a popular and successful program, as shown by the fact that a greater number of cases have been mediated almost every year since the program's inception. Further, MAP mediators had been successfully settling more than half of the appeals referred to mediation, but as noted above, OPM's "clean record" regulation (under revoked EO 13839) has adversely affected settlements. While mediators continue to settle a substantial portion of the lower number of appeals now being referred to MAP, greater time and effort must be expended by the mediator and the parties, and the number and percentage of successful settlements have decreased. Nevertheless, even where the case is resolved by an AJ's decision, the mediation process often helps sharpen the parties' focus on the matters truly in dispute and the resolution they seek. When mediators were asking parties to complete evaluations at the end of each mediation, more than 95% stated they would use MAP again.

### **Merit Systems Studies and OPM Oversight**

The Board has the statutory responsibility to conduct studies of the civil service and other merit systems in the executive branch and submit the resulting reports to the President and Congress. The studies support strong and viable merit systems, which protect the public's interest in a high quality, professional workforce managed under the MSPs and free from PPPs. The studies are based on objective, independent research that assesses and evaluates Federal merit system policies, operations, and practice from a long-term perspective. This function, in conjunction with the agency's adjudication of individual appeals and authority to review human resource regulations, ensures that the Board has the full legal authority necessary to oversee Federal merit systems at the systemic level and to remedy PPPs on an individual level. MSPB studies address the variety of challenges facing the Federal Government in managing its workforce.

## Publications Issued between FY 2019 and FY 2021

No study reports have been transmitted to the President and Congress since the loss of quorum in January 2017. However, in addition to regular editions of the *Issues of Merit* newsletter, MSPB's OPE issued the following non-study report publications in the past few years:

*Determining an Acceptable Level of Competence for Step Increases* (April 2021) reviews data and practices related to the within grade increase (WGI), a periodic fixed pay increase that is granted provided that the employee performs at “an acceptable level of competence.” This research brief explores factors that are important to the WGI process, the role of the WGI in addressing under-performance, and some lessons learned for agencies to consider.

*Direct-Hire Authority Under 5 U.S.C. § 3304: Usage and Outcomes* (February 2021) discusses Federal agency use of direct hire authorities (DHAs): streamlined procedures to appoint new employees without regard to selected merit system and public policy provisions, including ranking and veterans' preference. This research brief then looks more closely at the DHA covered under 5 U.S.C. § 3304(a)(3) and is approved and overseen by OPM. As discussed, although agencies believe that section 3304 DHAs are useful, their vision of the authority's purpose and use appears to differ from OPM's.

*The Importance of Job Fit for Federal Agencies and Employees* (October 2020) draws on professional literature and selected items from the 2016 Merit Principles Survey (MPS) to describe three distinct ways employee may fit with their job; discuss how job fit relates to workplace outcomes, such as job satisfaction, employee engagement, performance appraisal ratings, and intention to leave; and outline actions in areas such as job design, hiring, training, and performance management that might help Federal managers and employees improve job fit.

*The State of the Federal HR Workforce: Changes and Challenges* (May 2020) presents preliminary findings from MSPB's research to discuss how the role of HR has changed over the past 25 years; examine the expectations that customers of Federal HR staff have for the HR function; and describe barriers to making HR offices and HR staff more consultative.

*Building on OPM's Hiring Improvement Memo* (October 2019) digests findings and recommendations from previous MSPB publications that policymakers, OPM, and agencies can take to move in the direction outlined in OPM's September 2019 memo “Improving Federal Hiring Through the Use of Effective Assessment Strategies to Advance Mission Outcomes.” Those steps include getting the right people involved in hiring from the beginning; doing a good job of defining job qualifications; using valid assessments to identify the applicants most likely to have those qualifications; and making those assessments easily accessible to all Federal agencies.

*Managing Employees to Perform Emotionally Laborious Work* (July 2019) uses data from the 2016 MPS to examine the extent and effects of emotional labor on employees. Analysis shows that a need to conceal or feign emotions on the job is related to emotional fatigue, a lower intent to remain in the position, fewer good performance behaviors, lower performance appraisal ratings, and reduced engagement. But what can agencies do to reduce the need to pretend or hide emotions when the work requires the display and management of emotions? This brief uses examples from current agency practices to answer that question.

*Remedying Unacceptable Performance in the Federal Civil Service* (June 2019) explains that for decades, the Federal Government has been seeking useful means to address the issue of Federal employees whose performance at work is unacceptable. But why do some employees perform badly, and how effective are various approaches in bringing about the necessary improvements in performance? This brief answers those questions and discusses what agencies can do about those answers.

*The Perceived Incidence of Prohibited Personnel Practices* (June 2019) describes the 14 PPPs with potential consequences for officials who commit a PPP, examines whether agencies are truly preventing PPPs, and explains the consequences for the effectiveness of the civil service if employees believe that agencies fail to prevent or correct PPPs. This research brief uses data from the 2016 MPS to discuss respondents' perceptions that they have seen a PPP and the relationship between such perceptions and their views of a variety of workplace issues.

*Improving Leadership Through Better Probationary Practices* (May 2019) observes that when used properly, the probationary period is one of the most valid predictors of future success and can help ensure that the Federal Government has a cadre of the most qualified, competent leaders. This perspectives brief examines how the supervisory and managerial probationary periods are being used by agencies, identifies what barriers exist to using them more effectively, and builds on prior MSPB research to discuss what steps agencies can take to improve Federal leadership through better probationary practices.

## **Other Studies Activity**

OPE has prepared an updated research agenda for review and approval by incoming agency leadership and administered an MPS between January and April 2021. This MPS focused on a small set of core topics, anticipating that subsequent surveys will cover topics from a finalized research agenda. Publications based on the 2021 MPS should be ready for issuance in FY 2022. MSPB notes that the COVID-19 pandemic may affect both research (e.g., the ability to conduct field work) and findings (e.g., working conditions and employee perceptions of leadership effectiveness and integrity).

## **Information Technology**

MSPB's primary mission is to provide for independent, non-partisan adjudication of appeals of personnel actions for Federal employees. Generally, about 50% of appeals filed with the agency are from *pro se* appellants—employees representing themselves. All appellants (represented or not) are expected to file an appeal and to respond to orders in a timely manner or risk having their cases dismissed. The Board's current electronic filing system, e-Appeal Online, allows Federal agencies and appellants access to party filings and Board issuances through e-Appeal Online as soon as they are filed or issued. Parties who elect to file electronically through e-Appeal Online receive email notification of orders and issuances from MSPB instantaneously, rather than having to wait for service by regular mail. MSPB is targeting an FY 2022 release of a new enterprise case management and e-filing system, which will replace its legacy systems, including e-Appeal Online, and will include enhanced capabilities for external and internal users. Continuing the IT modernization, including increasing bandwidth and cloud adoption, is the focus for FY 2022.

MSPB's Office of Information Resources Management (IRM) designs, develops, implements, and maintains the agency's IT infrastructure, Federal Information Security Management Act (FISMA) IT systems, and cybersecurity program. In addition, IRM is responsible for the overall direction and management of IT and cybersecurity programs at all MSPB facilities. IRM provides technical and operational support to MSPB to guarantee IT efficiency, effectiveness, compliance, and cybersecurity to enable the agency's mission.

## **Human Resources**

MSPB contracts with USDA's APHIS for selected HR administrative and operational services through an interagency agreement. The agreement is developed between the two agencies and monitored within MSPB's Office of Financial and Administrative Management.

MSPB contracts with Federal Occupational Health (FOH), a service unit within the U.S. Department of Health and Human Services' Program Support Center, to provide basic occupational health services to all its employees throughout the country. In addition, the agency contracts with FOH to offer all employees access to the Employee Assistance Program (EAP). The EAP assists the agency in addressing productivity issues by providing both prevention and intervention for employee problems, which ultimately improves employee health and functioning, as well as workplace performance. MSPB's agreement with FOH provides for a comprehensive EAP, delivering short-term, problem-focused counseling and a variety of services. While many health and wellness activities and accommodations are not equally available to each employee with respect to workplace or onsite availability of services, the agency does strive to ensure that each employee understands that it fully supports a healthy and safe workplace for all employees.

Additionally, MSPB will engage in robust strategic human capital planning efforts. It is of the utmost importance to MSPB leadership that the agency hires and retains a diverse and highly qualified legal, research, analytical, and administrative workforce to support MSPB's mission now and in the future.

## **Financial Management**

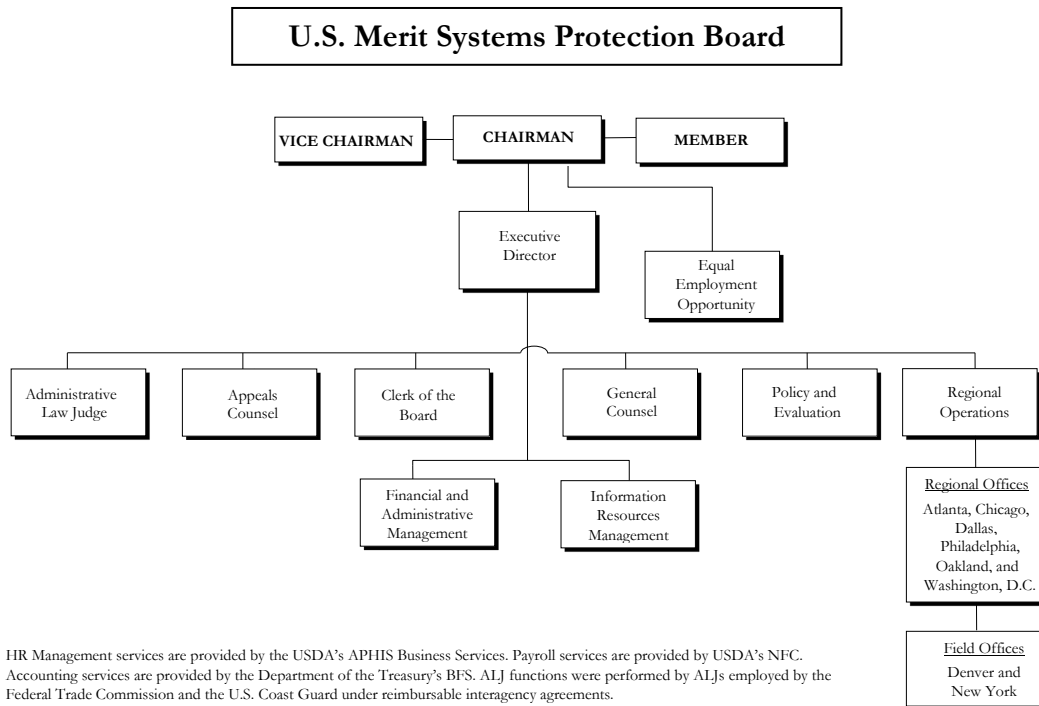
MSPB has initiated cross-servicing agreements with the Treasury Department's BFS for its accounting, financial auditing, purchasing, and travel-related services and support. Since 2002, BFS has processed MSPB's administrative payments and prepared its accounting reports. The Board has received unqualified/unmodified opinions on its audits since the agency has been subject to audits of its financial statements.

In addition to the agreement in place for personnel services, MSPB contracts with USDA's NFC for processing of payroll and payroll-related activities including earnings and leave statements, W-2 information, and debt management. The cross-servicing relationships with these organizations have provided MSPB with timely responses and more accurate processing of information from larger pools of knowledgeable staff than would be possible with a smaller in-house staff alone. BFS, APHIS, and NFC have the resources to stay current with the latest technologies, so they can provide these services more efficiently and economically.

## Equal Employment Opportunity

MSPB's Office of Equal Employment Opportunity (OEEO) plans, implements and evaluates the agency's affirmative employment programs and initiatives, advises senior executives, managers and supervisors about these programs and initiatives, oversees diversity and inclusion initiatives, and provides all employees training on rights and remedies available under the anti-discrimination laws and whistleblower protection laws. OEEO provides equal employment opportunity counseling, formal complaint processing, and alternative dispute resolution services to current and former employees, as well as applicants who allege discrimination. OEEO evaluates and reports MSPB's complaint data to Congress, EEOC, OPM, and other external stakeholders, and workforce demographics by occupation and grade to the EEOC. The EEO Director also coordinates MSPB's Diversity and Inclusion Council.

## Organization Chart



## List of Abbreviations and Acronyms

ADR	Alternate Dispute Resolution
AJ	Administrative Judge
ALJ	Administrative Law Judge
APHIS	Animal and Plant Health Inspection Service
BFS	Bureau of Fiscal Services
CSC	Civil Service Commission
CSRA	Civil Service Reform Act of 1978
DHA	Direct Hire Authority
EAP	Employee Assistance Program
EEOC	Equal Employment Opportunity Commission
EO	Executive Order
FISMA	Federal Information Security Management Act
FOH	Federal Occupational Health
FTE	Full Time Equivalent
FY	Fiscal Year
GSA	General Services Administration
HQ	Headquarters
HR	Human Resources
IG	Inspector General
IRM	Information Resource Management
IT	Information Technology
MAP	Mediation Appeals Program
MPS	Merit Principles Survey
MSPs	Merit System Principles
MSPB	Merit Systems Protection Board
NDAA	National Defense Authorization Act

NFC	National Finance Center
OEEEO	Office of Equal Employment Opportunity
OMB	Office of Management and Budget
OPE	Office of Policy and Evaluation
OPM	Office of Personnel Management
OSC	Office of Special Counsel
PFR	Petitions for Review
PPPs	Prohibited Personnel Practices
RIF	Reduction in Force
RSA	Reimbursable Service Agreements
USDA	U.S. Department of Agriculture
VA	Department of Veteran Affairs
WGI	Within Grade Increase
WPA	Whistleblower Protection Act
WPEA	Whistleblower Protection Enhancement Act